No. 88-1010

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1988

LANDAHL, BROWN & WEED ASSOCIATES, INC.
Petitioner

v.

LONGARDNER & ASSOCIATES, INC.
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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Questions Presented For Review

I. Whether the bankruptcy court's order approving a plan of reorganization should be set aside because the creditor did not receive notice of the entry of the order, and do the lower courts have the power to extend the time to file an appeal in such a case?

II. Whether the bankruptcy court has the power to reconsider an order approving plan of reorganization where the creditor did not receive notice of the entry of the order without the showing of fraud in view of the language of 11 U.S.C. § 1144 providing that a confirmed plan of reorganization once it has been entered may be set aside only upon the showing of fraud?

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Opinions Below

The opinion of the U. S. Court of Appeals for the Seventh Circuit is reported at 855 F.2d 455 (7th Cir. 1988) and is reproduced at App. A.

The opinion of the U.S. District Court for the Southern District of Indiana, Indianapolis Division, is unreported and is reproduced at App. B. The opinion of the U.S. Bankruptcy Court is also unreported and is reproduced at App. C.

Jurisdictional Grounds

This is an action that originated below from the U.S. Bankruptcy Court. An appeal was taken from the ruling of the U.S. Bankruptcy Court to the U.S. District Court pursuant to 28 U.S.C. §§ 158, 1334(a) and Bankruptcy Rules 8001, et seq. An appeal was taken from the U.S. District Court to the U.S. Court of Appeals pursuant to 28 U.S.C. §§ 158(d), 1291. This petition for writ of certiorari is being filed in this Court pursuant to 28 U.S.C. § 1254. The decision of the U.S. Court of

Appeals was rendered on August 24, 1988. By order of November 15, 1988, pursuant to 28 U.S.C. § 2101(c), this Court extended the time for filing the petition to December 22, 1988.

Statues and Court Rules Involved

11 U.S.C. § 350 -- REOPENING CASES

(a) After an estate is fully administered and the court has discharged the trustee, the court shall close the case.

(b) A case may be reopened in the court in which such case was closed to administer assets, to accord relief to the debtor, or for other cause.

11 U.S.C. § 1144 --REVOCATION OF AN ORDER OF CONFIRMATION

On request of a party in interest at any time before 180 days after the date of the entry of the order of confirmation, and after notice and a hearing, the court may revoke such order if and only if such

order was procured by fraud. An order under this section revoking an order of confirmation shall--

(1) contain such provisions as are necessary to protect any entity acquiring rights in good faith reliance on the order of confirmation; and

(2) revoke the discharge of the debtor.

RULE 60, FEDERAL RULES OF CIVIL PROCEDURE

(a) **Clerical Mistakes.** Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.

(b) **Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc.** On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2)

newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether herertofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse part; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is base had been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment order or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C., § 1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by

motion as prescribed in these rules or by an independent action.

RULE 77(d), FEDERAL RULES OF CIVIL PROCEDURE

(d) **Notice of Orders of Judgments.** Immediately upon the entry of an order or judgment the clerk shall serve a notice of the entry by mail in the manner provided for in Rule 5 upon each party who is not in default for failure to appear, and shall make a note in the docket of the mailing. Such mailing is sufficient notice for all purposes for which notice of the entry of an order is required by these rules; but any party may in addition serve a notice of such entry in the manner provided in Rule 5 for the service of papers. Lack of notice of the entry by the clerk does not affect the time to appeal or relieve or authorize the court to relieve a party for failure to appeal within the time allowed, except as permitted in Rule 4(a) of the Federal Rules of Appellate Procedure.

BANKRUPTCY RULE 3003 (b)(1)

(b) Schedule of Liabilities and List of Equity Security Holders

(1) Schedule of Liabilities. The schedule of liabilities filed pursuant to § 521(1) of the Code shall constitute prima facie evidence of the

validity and amount of the claims of creditors, unless they are scheduled as disputed, contingent, or unliquidated. It shall not be necessary for a creditor or equity security holder to file a proof of claim or interest except as provided in subdivision (c)(2) of this rule.

BANKRUPTCY RULE 3020(b)-(d)

(b) Objections to and Hearing on Confirmation

(1) Objections. Objections to confirmation of the plan shall be filed with the court and served on the debtor, the trustee, any committee appointed under the Code and on any other entity designated by the court, within a time fixed by the court. An objection to confirmation is governed by Rule 9014.

(2) Hearing. The court shall rule on confirmation of the plan after notice and hearing as provided in Rule 2002. If no objection is timely filed, the court may determine that the plan has been proposed in good faith and not by any means forbidden by law without receiving evidence on such issues.

(c) Order of Confirmation. The order of confirmation shall conform to Official Form No. 31 and notice of entry thereof shall be mailed promptly as provided in Rule 2002(f) to the debtor,

creditors, equity security holders and other parties in interest.

(d) Retained Power. Notwithstanding the entry of the order of confirmation, the court may enter all orders necessary to administer the estate.

BANKRUPTCY RULE 7001 -- SCOPE OF RULES OF PART VII

An adversary proceeding is governed by the rules of this Part VII. It is a proceeding in a bankruptcy court (1) to recover money or property, except a proceeding under § 554(b) or § 725 of the Code, Rule 2017, or Rule 6002, (2) to determine the validity, priority, or extent of a lien or other interest in property, other than a proceeding under Rule 4003(d), (3) to obtain approval pursuant to § 363(h) for the sale of both the interest of the estate and of a co-owner in property, (4) to object to or revoke a discharge, (5) to revoke an order of confirmation of a chapter 11 or chapter 13 plan, (6) to determine the dischargeability of a debt, (7) to obtain an injunction or other equitable relief, (8) to subordinate any allowed claim or interest, except when subordination is provided in a chapter 9, 11, or 13 plan, (9) to obtain a declaratory judgment relating to any of the foregoing, or (10) to determine a claim or cause of action removed to a bankruptcy court.

BANKRUPTCY RULE 8002(a) & (c) -- TIME FOR FILING NOTICE OF APPEAL

(a) Ten-day Period. The notice of appeal shall be filed with the clerk within 10 days of the date of the entry of the judgment, order, or decree appealed from. If a timely notice of appeal is filed by a party, any other party may file a notice of appeal within 10 days of the date on which the first notice of appeal was filed, or within the time otherwise prescribed by this rule, whichever period last expires. If a notice of appeal is mistakenly filed with the district court or the bankruptcy appellate panel, the clerk of the district court or the clerk of the bankruptcy appellate panel shall note thereon the date on which is was received and transmit it to the clerk and it shall be deemed filed with the clerk on the date so noted.

(c) Extension of Time for Appeal. The bankruptcy judge may extend the time for filing the notice of appeal by any party for a period not to exceed 20 days from the expiration of the time otherwise prescribed by this rule. A request to extend the time of filing a notice of appeal must be made before the time for filing a notice of appeal has expired, except that a request made no more than 20 days after the expiration of the time for filing a notice of appeal may be granted upon a showing of excusable neglect if the judgment or

order appealed from does not authorize the sale of any property or the obtaining of credit or the incurring of debt under § 364 of the Code, or is not a judgment or order approving a disclosure statement, confirming a plan, dismissing a case, or converting the case to a case under another chapter of the Code.

BANKRUPTCY RULE 9005 -- HARMLESS ERROR

Rule 61 F.R.Civ.P. applies in cases under the Code. When appropriate, the court may order the correction of any error or defect or the cure of any omission which does not affect substantial rights.

BANKRUPTCY RULE 9014 -- CONTESTED MATTERS

In a contested matter in a case under the Code not otherwise governed by these rules, relief shall be requested by motion, and reasonable notice and opportunity for hearing shall be afforded the party against whom relief is sought. No response is required under this rule unless the court orders an answer to a motion. The motion shall be served in the manner provided for service of a summons and compliant by Rule 7004, and, unless the court otherwise directs, the following rules shall apply:

7021, 7025, 7026, 7028-7037, 7041, 7042, 7052, 7054-7056, 7062, 7064, 7069, and 7071. The court may at any stage in a particular matter direct that one or more of the other rules in Part VII shall apply. An entity that desires to be perpetuate testimony may proceed in the same manner as provided in Rule 7027 for the taking of a deposition before an adversary proceeding. The clerk shall give notice to the parties of the entry of an order directing that additional rules of Part VII are applicable or that certain of the rules of Part VII are not applicable. The notice shall be given within such time as is necessary to afford the parties a reasonable opportunity to comply with the procedures made applicable by the order.

BANKRUPTCY RULE 9022 -- NOTICE OF JUDGMENT OR ORDER

(a) Judgment or Order of Bankruptcy Judge. Immediately on the entry of a judgment or order the clerk shall serve a notice of the entry by mail in the manner provided by Rule 7005 on the contesting parties and on other entities as the court directs. Service of the notice shall be noted in the docket. Lack of notice of the entry does not affect the time to appeal or relieve or authorize the court to relieve a party for failure to appeal within

the time allowed, except as permitted in Rule 8002.

(b) Judgment or Order of District Judge. Notice of a judgment or order entered by a district judge while acting in a case under the code is governed by Rule 77(d) F.R.Civ.P.

BANKRUPTCY RULE 9024 -- RELIEF FROM JUDGMENT OR ORDER

Rule 60 F.R.Civ.P. applies in cases under the Code except that (1) a motion to reopen a case under the Code or for the reconsideration of an order allowing or disallowing a claim against the estate entered without a contest is not subject to the one year limitation prescribed in Rule 60(b), (2) a complaint to revoke a discharge in a chapter 7 liquidation case may be filed only within the time allowed by § 727(e) of the Code, and (3) a complaint to revoke an order confirming a plan may be filed only within the time allowed by § 1144 or § 1330.

STATEMENT OF THE CASE

STATEMENT OF FACTS

On October 22, 1982, Longardner & Associates, Inc. (Longardner) filed a petition for bankruptcy reorganization in the United States Bankruptcy Court for the Southern District of Indiana, Indianapolis Division. At the time of the filing of the petition, there was a suit pending in the Circuit Court of Lee County, Florida filed by Landahl, Brown & Weed Asso., Inc. (Landahl) against Longardner. With leave of the Bankruptcy Court,that suit was tried and a jury verdict of $266,254 was returned against Longardner in favor of Landahl. That judgment was entered on August 14, 1984 and Landahl timely filed a proof of claim in the Bankruptcy Court.

On September 19, 1984, Longardner filed its plan for reorganization and disclosure statement, and on October 4, 1984 Landahl filed its objection to the plan and disclosure statement.1/ The plan provided for Landahl to receive only $5,000 or 2% of its claim in payment of its judgment, whereas all other creditors,

1/Landahl objected to the plan and disclosure statement on the grounds of false oath and schedule of assets, misrepresentation of assets and debts, failure to disclose assets, insider dealing and that the plan was not fair and equitable as required under the Code, but discriminated against Landahl in favor of insiders and other claims.

including insiders, were to receive at least a 50% recovery on their claims. Also, coinciding with the filing of the plan, Longardner reduced its assets being claimed monthly in sworn statements filed with the Bankruptcy Court from $1,184,000, with only $279,000 in debts, to only $84,000 in assets with $90,000 in debts to support the plan. Under the Bankruptcy Code, if the petitioner's assets exceed its debts, the plan cannot be approved by the Court. Also,the plan provided that the personal judgment of Landahl against the principal of Longardner, Robert Longardner, was to be satisfied by the payment of the $5,000 under the plan, which is entirely outside the jurisdiction of the bankruptcy court.

Landahl filed objections to the plan and a hearing was scheduled for November 26, 1984. Landahl appeared in Court for the November 26, 1984 hearing with his out of town witness prepared to proceed with the hearing. However, when the parties appeared for the hearing, the court advised that its calendar was too crowded to hear the case as it was too involved and complex. The Court advised that it was continuing the case and would provide notice to the parties of the continued hearing date. However, Landahl was never given notice of any new hearing date. On March 7 1985, the Court with only Longardner present approved the Longardner plan of reorganization, providing that Landahl was to only receive the $5,000 in payment of its judgment against both the Longardner corporation and Robert Longardner, who was not a party to the

bankruptcy proceedings. At the March 7, 1985 hearing, Longardner's counsel presented an order he had prepared and the court entered the order approving the Longardner plan of reorganization. The order was not sent to any parties, and Landahl never received notice of the entry or the order.2/

Shortly before the scheduled November 26, 1984 hearing, Longardner for the first time on November 21, 1984 filed an objection to the Landahl claim of $266,254. By order of December 13, 1984, the Court scheduled a hearing on that objection for March 7, 1985, and giving Landahl notice of the hearing. Landahl, with its witness, prepared to appear before the Court for the hearing. However, an agreement was reached between Longardner and Landahl that Longardner would withdraw its objection to the Landahl claim and that Landahl would not contend that its claim was a secured lien upon the bankruptcy assets. There were no real estate assets of Longardner claimed in the bankruptcy and to Landahl the issue was insignificant. A stipulation was signed setting forth this agreement for

2/After Landahl had filed an appeal to the U.S. District Court and the appeal denied on March 19, 1987, the Bankruptcy Court did send notice to parties dated July 31, 1987 that the Bankruptcy Court had approved the Longardner plan of reorganization on March 7, 1985, two years earlier. Landahl filed an appeal from this notice, but the Bankruptcy Clerk refused to accept the notice of appeal or process the appeal and the Bankruptcy Court entered an order denying Landahl's right of appeal.

filing with the Court and it was agreed by counsel that the case was to be taken off the calendar for March 7, 1985. By letter dated February 23, 1985, Landahl wrote counsel for Longardner, returning the stipulation:

> We trust you will advise the Court to remove the case from the calendar for March 7, 1985.

Thereafter, by order of March 12, 1985, the Court approved the stipulation, and as far as Landahl knew there was no matter now scheduled for hearing on March 7, 1985. It is to be remembered that the only notice Landahl received of a hearing for March 7, 1985 was on the objection of Longardner to the Landahl claim. Between January 1985 and March 1, 1985, counsel for Landahl had telephoned counsel for Longardner exactly ten times. During these telephone conversations, it was agreed that the case was to be removed from the docket for March 7, 1985. Of course, Longardner apparently knew at this time that the plan of reorganization was scheduled for March 7, 1985, but failed at any time to correct Landahl's counsel's misconception.

When Longardner's counsel appeared on March 7, 1985, and Landahl made no appearance, Longardner's counsel at that time, if not sooner, had to be aware that Landahl had no knowledge of the March 7, 1985 hearing. However, he went forward with the hearing, without telephoning Landahl's counsel, as would have been customary. Further, at the conclusion of the

hearing he presented an order to the Court to be signed, which the Court signed. That order approved the Longardner plan of reorganization, to which Landahl had repeatedly objected in strong and unequivocal terms, pointing out specific facts showing misrepresentation of assets and insider dealing. On one occasion, Mr. Longardner personally collected stock and $10,000 in cash in exchange for a $265,757 asset listed in the bankruptcy schedules for which the bankrupt received nothing.

After the March 7, 1985 order approving the Longardner plan of reorganization was entered, neither the Clerk, the Court, nor Longardner undertook any effort of any kind to see that Landahl was provided notice of the order or knowledge that the order had been entered3/. After the time for appeal had expired, by letter dated May 7, 1985 (received May 15, 1985) counsel for Longardner simply sent to Landahl the $5,000 disbursement under the plan. The receipt of this check was the first knowledge Landahl had of the entry of the order.

It has been conceded by the Court, the Clerk and by Longardner that no notice was sent to Landahl of the entry of the March 7, 1985 order. In fact, there was

3/See footnote 1.

never any attempt by anyone to send such notice.4/

It is conceded by everyone that Landahl did not receive notice that the March 7, 1985 order had been entered. The first notice that Landahl received of any hearing or that an order had been entered was the letter of May 7, 1985 from Longardner's counsel enclosing the check for $5,000 as full payment of Landahl's claims.

After Landahl learned of the March 7, 1985 order it filed a motion to set aside the order. The motion was based, inter alia, upon the fact that Landahl did not receive notice of the hearing or the entry of the order. The motion was denied on December 9, 1985 on the ground that Landahl's only remedy was pursuant to 11 U.S.C. § 1144 which required a showing of fraud in the procurement of the order and the Court concluded Landahl had not suffieiently shown such fraud.

Landahl timely filed a notice of appeal to the U.S. District Court, Southern District of Indiana,

4/Also, although Landahl too did not receive notice of the scheduling of the hearing on the approval of the plan for March 7,1985, the Bankruptcy Court held a hearing on this lack of notice and concluded, without the presentation of evidence, and over the affidavit of Landahl's counsel that no notice was received, that notice was sent by mail to Landahl and actual receipt of notice is not required. There was a certification by the clerk in the Court file which was unknown to Landahl at the time of the hearing, upon which the Bankruptcy Court relied, that notice was sent to all parties, but no other evidence to rebut Landahl's affidavit or evidence of actual sending of the notice to Landahl. See App. A. In regard to the actual entry of the March 7, 1985 order, there was no certification of the clerk and it was conceded that no notice was in fact sent to Landhal.

Indianapolis Division, which sustained the ruling of the Bankruptcy Court by order of March 19, 1987. Landahl appealed this ruling to the Court of Appeals for the Seventh Circuit which affirmed the ruling of the District Court by decision of August 24, 1988.

STATEMENT OF PROCEEDINGS BELOW

On October 17, 1984, Landahl filed a claim in the Longardner bankruptcy proceedings in the U.S. Bankruptcy Court, Southern District of Indiana, Indianapolis Division, based upon the judgment it had obtained in the amount of $266,254 in the Florida State Court. By stipulation of the parties, the Landahl claim was uncontested in the Bankruptcy Court as an unsecured claim.

On March 7, 1985, the Bankruptcy Court held a hearing on the reorganization plan of Longardner and on the same date entered an order approving the plan. No notice was given to any party to the proceedings of the March 7, 1985 order by any person. Longardner, of course, had knowledge as it appeared at the March 7, 1984 hearing. Landahl did not receive notice of the March 7, 1985 hearing either, but the Bankruptcy Court found, based upon a statement of the clerk of court contained in the court file that notice had been sent to all parties, that notice was in fact sent to Landahl and it was immaterial whether notice was in fact received by Landahl. There is no dispute that Landahl was not given notice of the entry of the March 7, 1985 order.

Upon learning of the entry of the order, on May 21, 1985, Landahl filed a motion with the Bankruptcy Court to have the March 7, 1985 order set aside. On December 9, 1985, the motion was denied by the Bankruptcy Court. See App. A.

On December 16, 1985, Landahl filed an appeal to the U.S. District Court, Southern District of Indiana, Indianapolis Division, from the December 9, 1985 ruling. On March 19, 1987, the U.S. District Court, denied the Landahl appeal (App. B), and on April 13, 1987, Landahl filed an appeal to the U.S. Court of Appeal for the Seventh Circuit. By decision of August 24, 1988, that Court affirmed the decision of the U.S. District Court. App. C.

ARGUMENT I

Landahl submits that the Bankruptcy Court's order must be set aside, and at the very least, the time for appeal extended, since no notice of the entry of the Court's order was given to Landahl. Under the facts of this case, Landahl had no reason to expect the order might be entered, and the time for appeal was only 10 days. It would not be realistic with a 10 day appeal period to say that Landahl had the obligation to keep informed of the status of the case in the court, as such a requirement would require Landahl to check with the court every day or so, over a many year period.

The Courts below held that, although Landahl was not given notice of the entry of the order of March 7, 1985, Landahl had no remedy or recourse. He simply lost his day in court and he lost his right to appeal the objections made to the Longardner plan and disclosure statement. A general statement of the Landahl objections are related at footnote 1 of this Petition. The reasoning was that Bankruptcy Rule 8002(a) provides that an appeal must be filed within 10 days of the entry of the order and Bankruptcy Rule 8002(c) provides that an extension of time to file an appeal may only be granted if a motion for extension of time is filed within 20 days of the expiration of the time to file the notice of appeal, which in this case would have been 30 days from March 7, 1985. As of that date, Landahl had no knowledge of the entry of the order. Also, Bankruptcy

Rule 9022(a) provides that immediately on the entry of an order the clerk shall service notice of the entry of the order. However, the Rule also provides that lack of notice does not affect the time to appeal. The courts below concluded that these Rules were controlling,[5/] and that there was no basis for Landahl to obtain relief from the order which concededly was entered without notice or knowledge to Landahl.

In Hill v. Hawes, 320 U.S. 520 (1944), this Court held the time for appeal was extended where the clerk failed to provide notice as required under Rule 77(d), Rules of Civil Procedure, which is identical to Bankruptcy Rule 9022(a) in requiring the clerk to give notice of the entry of an order. In response to the Hill v. Hawes decision, Rule 77(d) was amended to provide that lack of notice of the entry of an order does not extend the time to appeal. Bankruptcy Rule 9022 (a) was adopted from Rule 77(d), as amended. However, note the distinction between Rule 77(d) and Bankruptcy Rule 9022(a). Rule 77(d) appears to be limited to the failure of the clerk to provide notice, but Bankruptcy Rule 9022(a) appears to be more encompassing of notice from any source from which a party might reasonably expect to receive notice, such as opposing counsel.

5/Bankruptcy Rule 9022 properly has no application to this case, as Bankruptcy Rule 3020(c) expressly provides for mailing notices of orders of confirmations and does not relate to Rule 9022. The Rules are mutually exclusive and Rule 3020(c) has the specific application to the Longardner March 7, 1985 order approving the plan of reorganization.

It shocks the senses to think our jurisprudence has traveled to the point that a court can rule but never provide notice of its ruling and thereby divest parties of due process. The dictates of simple justice and due process constitutional rights require that Landahl must be given notice before it can be divested of its rights. See New York v. New York, N.H. & H.R. Co., 344 U.S. 293 (1953); Armstrong v. Manzo, 380 U.S. 545 (1965); Fuentes v. Shevin, 407 U.S. 67 (1972). See also, Pfister v. Northern Illinois Finance Corp., 317 U.S. 133 (1942, which is a case prior to Bankruptcy Rule 9022(a) holding that a 10 day appeal period could be extended by lower courts on equitable grounds.

There is a conflict in the decisions of the federal courts of appeal on these issues. Decisions which support the decisions of the courts below in this case are:[6/] In re Roanca Realty, Inc. 747 F.2d 816 (1st Cir. 1984); Ashby v. Weitzman, 780 F.2d 1043 (D.C. Cir. 1986); Polylok Corp. v. Manning, 793 F.2d 1318 (D.C. Cir. 1986); Wilson v. Atwood Group, 725 F.2d 255 (5th Cir. 1984); Hall v. Com. Mental Health Center, 772 F. 2d 42 (3rd Cir. 1985).

The decisions which support the position of Landahl presented in this petition are: Babich v.

6/Cf. Matter of Lintz West Side Lumber, Inc., 655 F.2d 786 (7th Cir. 1981).

Clower, 528 F.2d 293 (4th Cir. 1975); Lieberman v. Gulf Oil Corp., 315 F2d 403 (2d Cir. 1963), cert. denied, 375 U.S. 823 (1963); Hernandez-Rivera v. Immunization & Naturalization, 630 F.2d 1352 (9th Cir. 1980); Buckeye Cellulose Corp. v. Braggs Electric Construction, 569 F.2d 1036 (8th Cir. 1978); Fidelity & Dep. Co. of Md. v. USAForm Hail Pool, Inc., 523 F.2d 744 (5th Cir. 1975); Smith v. Jackson Tool & Die, Inc., 426 F. 2d 5 (5th Cir. 1970); Expectations Unlimited Aquatic Ent. Inc. v. Smithsonian Inst., 500 F.2d 808 (D.C. Cir. 1974); Braden v. University of Pittsburgh, 552 F.2d 948 (3rd Cir. 1977); Matter of Washington Group, Inc., 476 F. Supp. 246, affd without op 636 F.2d 1213 (4th Cir. 1979):cf. La Providencia Dev. Corp. 515 F. 2d 94, at 95 (1st Cir. 1975); cf. Spika v. Lombard, 763 F.2d 282 (7th Cir. 1985); cert den 474 U. S. 1056 (1986); Rogers v. Watt, 722 F. 2d 456 (9th Cir. 1983). See Intern. Controls Corp. v. Vesco, 556 F.2d 665 (2d Cir. 1977), holding Rule 60(b) relief was available in a securities law case, but found the District Court had not abused its discretion in finding appellant did not meet the conditions of Rule 60(b).

This Court has extended the time to appeal on equitable grounds without reliance on any rule or law, Harris Truck Lines, Inc. v. Cherry Meat Packers, Inc., 371 U.S. 215 (1962) and has also expanded Rule 60(b) F.R.Civ.P. to effect an equitable result to reset the

appeal time clock in Ackerman v. United States, 340 U.S. 193 (1950). We would note that Rule 60(b) F.R.Civ.P. has been adopted by reference for bankruptcy courts by Bankruptcy Rule 9024.

Bankruptcy Rule 9024(3) does provide that Rule 60 F.R. Civ.P. does not apply to a "complaint" to revoke an order confirming a plan of reorganization. However, the term "complaint" is a word of art under the Code and refers to proceedings under Part VII of the Bankruptcy Rules (Rule 7001, et. seq.). Landahl was proceeding on an objection to a claim under Bankruptcy Rule 3020(b)(1) which provides for proceedings to be by "motion" under Bankruptcy Rule 9014. This distinction is made clear in the Code and the exception under Rule 9024(3) does not apply to Landahl's objection to the claim. See the Advisory Committee Note, Bankruptcy Rule 7001. See the discussion of this point at pages 32-33 of this Petition.

Lower courts have also adopted the lead of this court and extended the right to appeal on equitable grounds without reliance on Rule 60(b) F.R.Civ.P. Lieberman v. Gulf Oil Corp, supra, relying on this Court's decision in Harris Truck Lines, Inc. v. Cherry Meat Packers, Inc., supra; Hernandez-Rivera v. Immunization & Naturalization, supra and Babich v. Clower, supra.

The issue of whether the time for appeal can be extended in view of the restrictive language of Bankruptcy Rule 9022(a) and Rule 77(d) F.R.Civ.P.

when a party has no knowledge or notice of the entry of an order deserves the review of this Court. There is a substantial conflict in the cases between circuits and the issue has national significant consequences. The denial of a party's day in court without notice is substantial, constitutional and a matter of fundamental right and due process.

Accordingly, Landahl respectfully requests that the court grant its petition for writ of certiorari.

ARGUMENT II

Although Landahl had no knowledge of the entry of the order approving the plan of reorganization, the court below held that the only remedy Landahl had was under section 1144 of the Bankruptcy Code (11 U.S. C.§ 1144). Section 1144 provides that once an order has been entered approving a plan of reorganization it may be revoked if, and only if, there is a showing within 180 days that the order was procured by fraud.

There is a conflict in the decisions of the federal courts of appeal on this issue. Some courts have recognized that a bankruptcy court is a court of equity and has equitable jurisdiction to review the matter on grounds other than fraud and beyond the 180 day period. Other courts have taken the view that Bankruptcy Rule 9024, which adopts Rule 60 F.R.Civ.P., allows relief. However, other courts have followed the rule applied by the courts below and held that section 1144 provides the exclusive means by which a confirmation order may be revoked once it has been entered. This latter rule makes some sense as to intervening rights and parties who have acted in reliance on the order and have prejudiced their position irrevocably, but it makes no sense where injustice has taken place as in the case with Landahl who received no notice of the order and insiders were paid 50% of their claims whereas Landahl was paid only .02% of its claim and to obtain the order, Longardner reduced its sworn

claim of net assets of over $900,000[7]/to $84,000 in assets and $90,000 in debts. Reorganization plans may only be approved if debts exceed liabilities.

We would specifically note that Bankruptcy Rule 9024 expressly provides that Rule 60 F.R.Civ.P. applies to Bankruptcy proceedings. And, of course, Rule 60 provides a number of grounds to set aside orders--mistakes, inadvertence, neglect, etc., including "any other reason justifying relief." This language is certainly broad enough to include the failure to notify a party of the entry of an order and allow Landahl to appeal the order and assert its objections to the plan and disclosure statement on appeal, if not in the Bankruptcy Court. We would hasten to point out that this is not just a simple case when no notice was sent to counsel but a case where counsel was misled by opposing counsel, where everyone associated with the case, including the judge, was aware of the strong objections of Landahl, who had been the only thorn to the approval of the plan, where absolutely no one made any kind of effort to see that Landahl received notice of the order, inspite of his repeated strong and written opposition to the plan,

7/Bankruptcy Rule 3003(b)(1) provides that the sworn schedules filed by Longardner constitute prima facie evidence of the correct amount of liabilities. The disclosure statement and plan approved by the Court without notice to Landahl were not sworn to by Longardner, but Landahl lost the right to appeal this issue, as well as the other objections Landahl had raised, based upon the rulings below.

where it appears that there may have been an intent to allow the time for appeal to expire before Landhal was given notice of the entry of the order and where notice was finally provided as required under the Code to all parties some two years later, where the Clerk of Court refused to accept the Landahl notice of appeal and the Court upheld this action by the Clerk of Court, and where the approved plan on its face discriminates unfairly against Landahl in favor of insiders and where the Court file alone shows either false oaths of assets and debts and/or a reduction of assets of over one million dollars in one month prior to the filing of the plan approved by the Court, without explanation. This situation justifies relief under Bankruptcy Rule 9024 which adopts Rule 60(b).

Bankruptcy Rule 9024(3) does provide that Rule 60 does not apply to a "complaint" to revoke an order confirming a plan of reorganization and that the "complaint" must be filed within the time limits of 11 U.S.C. § 1144. In this regard, it should be noted that the term "complaint" is a word of art and does not apply to the Landahl "motion." A "complaint" is governed by Bankruptcy Rules 7001, et. seq., which govern "adversary proceedings" in which the action is initially begun by a "complaint." Landahl was in the bankruptcy proceedings by virtue of a claim that had been filed as a "contested matter" pursuant to Bankruptcy Rules 3002(b)(1) and 9014, which provide for the proceedings

to be by "motion." Pursuant to Bankruptcy Rules 7003 and 7004, "adversary proceedings" are instituted by "complaint," as in Civil Rule 3, F.R.Civ.P. The complaint, process and pleadings are identical to a typical civil action, leading to a trial, with jury, on the merits. This was not the status of the Landahl claim, and Bankruptcy Rule 9024(3) is not a limitation or requirement applicable to Landahl. The fact that Bankruptcy Rule 9024(3) limits its applications to a "complaint", which is in effect a full blown civil proceeding in the bankruptcy court, is clear evidence of the intent that 60 F.R.Civ.P was to be applicable to a "motion" under the "contested matters" provisions of the Rules.

Decisions which recognize the inherent equity jurisdiction of courts to avoid the provisions of section 1144 are: Bizell v. Hemingway, 548 F.2d 505 (4th Cir. 1977)[8]; TMT Trailer Ferry, Inc. v. Anderson, 292 F.2d 455 (4th Cir. 1961), cert den 368 U.S. 956 (1962), cf. Matter of Seats, 537 F.2d 1176 (4th Cir. 1976), Levinson v. B. & M. Furniture Co., 120 F.2d. 1009 (2d Cir. 1941); See Restatement of Judgments, Second §§ 1(2), 2; cf. In re Peyton Realty Co., 148 F.2d 771 (3d Cir 1945); Mohonk Realty Corp. v. Wise Shoe Stores, 111 F.2d 287 (2d Cir. 1940).

[8]/Bizell v. Hemingway was decided under former 11 U.S.C. § 786 from which 11 U.S.C. § 1144 was adopted. The predeccsor to 11 U.S.C. § 786 was 11 U.S.C. § 31.

Decisions which recognize relief under Bankruptcy Rule 9024 or Civil Rule 60(b) to avoid the harsh results of section 1144 are: Bizell v. Hemingway, 548 F.2d 505 (4th Cir. 1977); Dal International Trading Co. v. Sword Line, Inc., 286 F.2d 523 (2d Cir. 1961).

Decisions which support the ruling below and hold section 1144 provides the exclusive remedy to revoke a plan of reorganization once entered are: In the Matter of Newport Harbor Assoc., 589 F.2d 20 (1st Cir. 1978); Whiteford Plastics Co. v. Chase National Bank, 179 F.2d 582 (2d Cir. 1950); In re Isidore Klein, Inc., 20 F.2d 906 (2d Cir. 1927); cf. In re Light & Co., 139 F.2d 313 (7th Cir. 1943) applying 11 U.S.C. § 31, which is an early predecessor of 11 U.S.C. § 1144.

We would also note that the bankruptcy courts are, of course, also divided on the issue. Compare for example, the excellent reasoned opinion of Re A. J. Mackay Co., 50 B.R. 756 (DC Utah 1985) holding section 1144 and Bankruptcy Rule 9024 do not prevent an out of time modification of an order of confirmation on grounds other than fraud as the bankruptcy courts have equitable powers to prevent injustice and to correct errors, with In re Chipwich, Inc., 64 B.R. 670 (S.D.N.Y. 1986) holding that section 1144 is the exclusive route for relief once the order has been entered. Mackay, asking the poignant question, quotes Judge Learned Hand:

> Why it is desirable that their orders, ruate coelum, should be immutable as the Twelve

> Tables, once the ink is dry, we cannot understand. 50 B.R. at 760

This Court has previously answered Judge Hand that bankruptcy courts do have equitable powers to see that technical considerations do not prevent injustice and to prevent injustice and unfairness, and has expressly stated the entire process of rehabilitation is open to reexamination out of time, subject to intervening rights. Pfister v. Northern Illinois Finance Corp., 317 U.S. 144, 152 (1942). Pfister held that the 10 day appeal period under the early law from a referee's orders was not immutable and should be extended where, as in the present case, there was no notice given of the referee's ruling. The 10 day appeal period applicable under the law applying to Pfister is the same related provision applicable under the present Bankruptcy Code. The referee under Pfister is the equivalent of the bankruptcy judge under the present Code and each have a 10 day period to file for review. See also this Court's decision in Pepper v. Litton, 308 U.S. 295 (1939) and the language at page 305, n. 11, recognizing the power of the bankruptcy court to utilize its equity jurisdiction to allow late claims to prevent injustice, in disregard of the express Code provision limit of six months. See also Wayne Gas Co. v Owens Co., 300 U.S. 131 (1937) holding that bankruptcy courts have the power to reopen a petition for reorganization although the time for appeal has expired.

It has been a logical process for some District Courts to rely on the Supreme Court cases such as

Pfister, Pepper, and Wayne Gas Co. and apply equitable powers to prevent injustice at the hands of a strict application of section 1144, and for other District Courts to apply the strict language of section 1444, which has never had the consideration of this Court.[9/]

It is a gross miscarriage of justice and serious abuse of due process to deny a party his day in court when he has not been given notice of the entry of an order, as in the present case, and no statutory language should be so strictly construed as to ignore such fundamental justice. Courts more and more, all around the Country, are leaning toward the rule that the failure to receive notice is not sufficient to apply equitable principles to afford justice in such cases,

9/However, the Bankruptcy Code and Rules are replete with provisions that would allow Landahl relief. Notwithstanding the provision of 11 U.S.C. § 1144, the Bankruptcy Code and Rule provide that confirmed plans may be modified or reopened long after they are approved without any showing of fraud. Rule 9005 authorizes relief from "any" error or omission that does not affect substantial rights, and the failure to give Landahl notice was an error and omission. Rule 3020(d) authorizes relief from "all" orders necessary to administer the estate, notwithstanding the entry of the order of confirmation, and this should include all orders necessary to fairly and properly administer the estate. The provisions of 11 U.S.C. § 350 authorize the reopening of closed cases. And, under 11 U.S.C. § 1127 plans may be modified after they have been confirmed. The provisions of Rule 3020(d) that authorize the "retained power" or continuing jurisdiction to contemplate the need to exercise retained jurisdiction over confirmed plans. It has been held that the bankruptcy courts retain jurisdiction simply to correct unfair results, without any misconduct by anyone. Re Seats, 537 F.2d 1176 (4th Cir 1976).

whereas the postal service is becoming more and more deficient in insuring delivery of documents mailed. Of course, in the present case, there is no dispute that no notice was sent or given, or intended to be sent or given, to Landahl, by the Court, the Clerk, or opposing counsel. Both the Court and opposing counsel had knowledge from Landahl's prior participation in the case and extensive pleadings filed that something was askew when Landhal did not appear for the March 7, 1985 hearing and was silent after the order was entered.

The issue presented here is significant and deserves the attention of the Court. It has nationwide importance and there are reported cases being decided each year in the bankruptcy courts, most of which do not reach appeal, with conflicting rulings. It is respectfully submitted that this Court should grant the petition and decide the issue.

CONCLUSION

It is submitted that the Court should grant Landahl's petition for writ of certiorari.

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In the
United States Court of Appeals
For the Seventh Circuit

No. 87-1599

IN RE: LONGARDNER & ASSOCIATES, INC.,

Debtor.

APPEAL OF: LANDAHL, BROWN & WEED ASSOCIATES, INC.

Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division.
No. 86 C 117 & 82 4202RA—**William E. Steckler**, *Judge.*

ARGUED DECEMBER 10, 1987—DECIDED AUGUST 24, 1988

Before CUDAHY, COFFEY and RIPPLE, *Circuit Judges.*

CUDAHY, *Circuit Judge.* Landahl, Brown & Weed Associates, Inc. (the "creditor") appeals a district court order affirming two orders of the bankruptcy court. The orders involve the confirmation of the plan of reorganization submitted by Longardner & Associates, Inc. (the "debtor"), and the denial of the creditor's motion to have the plan set aside.[1] The creditor seeks to have the case remanded to the bankruptcy court with instructions to vacate the confirmation order and to entertain its objections to the plan. We deny the creditor's request and affirm.

[1] The creditor entitled its motion, "Motion to Set Aside Order Confirming Amended Plan and Motion to Reconsider." In this opinion the motion will be referred to simply as the "motion to set aside."

I.

In October 1982, the debtor filed a petition for reorganization under Chapter 11 of the Bankruptcy Code. 11 U.S.C. §§ 1101-1146. It subsequently filed a plan of reorganization and a disclosure statement and later filed an amended plan and an amended disclosure statement. The creditor responded by filing objections to the amended disclosure statement, and the debtor then amended both the plan and the disclosure statement a second time.

On November 1, 1984, the bankruptcy court tentatively approved the second amended disclosure statement and scheduled a hearing on confirmation of the second amended plan for November 26. The creditor objected to the plan, claiming that it was inconsistent with previously filed financial records, that it omitted certain accounts receivable and other assets and that it proposed only $5,000 for settlement of the creditor's $266,000 claim. When the parties appeared before the bankruptcy court on November 26, the court informed them that the hearing would be rescheduled and that they would be notified by mail of the new hearing date.

On December 12, the court rescheduled the hearing for March 7, 1985, at 10:00 a.m., and mailed notice of the new hearing to the parties. The notice provided that the hearing "will take place . . . for consideration of confirmation of the Plan of Reorganization; objections as may be made to confirmation; . . . and such other matters as may properly come before the Court." Appendix to Appellant's Brief at 54. The creditor asserts that it did not receive this notice.

On December 13, the bankruptcy court entered its certification of mailing the notice to the parties. It entered an additional notice scheduling a hearing on the debtor's objection to the creditor's claim also for March 7, 1985, at 10:00 a.m. The creditor did receive this notice, which allegedly caused it to believe that the March 7 hearing dealt *solely* with the debtor's objection to the creditor's claim, rather than with both the debtor's objection *and* the court's confirmation of the proposed plan.

During the next several weeks, the creditor's counsel, Edward Bunn, and the debtor's counsel, Leonard Opperman, discussed the debtor's objection to the creditor's claim. In late February 1985, the parties agreed that the debtor would drop its objection to the claim in exchange for the creditor's assertion of an unsecured, rather than a secured, claim. The parties set forth this agreement in a stipulation filed with the court on February 27. This stipulation apparently caused the creditor mistakenly to believe that the March 7 hearing was unnecessary since the debtor's objection had been dropped. Bunn sent Opperman a letter stating, "We trust you will advise the Court to remove the case from the calendar for March 7, 1985." Appendix to Appellant's Brief at 53. Opperman received the letter, but contends that he assumed that the creditor was referring to the hearing on the debtor's objection to the creditor's claim, which the parties had resolved, but not to the hearing on the confirmation of the plan, which was also scheduled for the same date and time.

The bankruptcy court held the confirmation hearing on March 7 and approved the debtor's plan of reorganization. Bunn failed to appear on behalf of the creditor. Neither the court nor the debtor sent the creditor notice of the the entry of the reorganization plan. The bankruptcy court records confirm that copies of the order were distributed only to the parties present at the confirmation hearing.[2]

On March 12, the court sent notice of an order approving the stipulation the parties had filed on February 27. The creditor received this notice.

The creditor claims to have learned of the confirmation order on May 15, when it received a $5,000 check from the debtor as payment in full for its $266,000 claim. The creditor returned the check and, on May 21, filed with

[2] On July 31, 1987, while the creditor's appeal was pending before this court, the bankruptcy court mailed to the creditor notice of the March 7, 1985 order of confirmation.

the bankruptcy court a motion to set aside the confirmation of the plan. The creditor alleged that it had never received notice either of the confirmation hearing or of the order of entry and that this lack of notice severely prejudiced the creditor. The creditor also complained that its objections to the plan had "not been satisfied." Appendix to Appellant's Brief at 68.

On August 30, 1985, the bankruptcy court held a hearing on the creditor's motion. Bunn, representing the creditor, testified that no prejudice to the debtor would result from setting aside the reorganization plan. He urged that the creditor was entitled to notice of the confirmation of the plan and that failure to receive this notice affected the creditor's right to appeal the confirmation to the district court. In response to the bankruptcy court's repeated instruction that the creditor must prove fraud to set aside the confirmation of the plan, Bunn said that he didn't believe there was any fraud.[3]

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[3] Pertinent parts of Bunn's testimony at the August 30 hearing include:

> MR. BUNN: In any event, I have, during the period of this case, progress of this case, I have had a number of telephone conversations with Mr. Opperman, I think on an amicable basis. I don't suggest that Mr. Opperman intended to mislead me intentionally in regard to the case being taken off the docket. I just know that what my understanding was and what I said—and he may very well have assumed that when I used the word case that I was talking about the particular motion at issue being taken off.
>
> . . . .
>
> . . . The plan that was affirmed talked in terms of $84,000 in basic assets. However, we know, and I would ask the Court to take judicial notice of this, that [the debtor]—and I have got it in my pleadings; it's well documented—received $265,000 in accounts receivable while this bankruptcy matter is pending.
>
> . . . .
>
> THE COURT: Yes, but you have to prove a further factor, fraud. You haven't gotten to that point yet.

(Footnote continued on following page)

In October, the creditor filed a memorandum in support of its motion to set aside the plan, in which it reiterated many of the points made at the hearing. The creditor stated that it did not "suggest that the March 7, 1985 order was procured by fraud, but by some mistake notice was not sent to [the creditor]." Appendix to Appellant's Brief at 79. The creditor, however, encouraged the court to review allegations in its prior pleadings (which it attached as exhibits to the memorandum) to determine whether the debtor had engaged in fraud in its disclosure statements.

The bankruptcy court denied the creditor's motion to set aside. The court found that the creditor could obtain relief from a confirmed plan only under section 1144 of the Bankruptcy Code, which allows a court to revoke a confirmation order procured by fraud. 11 U.S.C. § 1144. The court concluded that the creditor had not alleged

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[3] *continued*

MR. BUNN: I don't believe there was any fraud. I am not even suggesting there was fraud.

THE COURT: But that's the only section you can set it aside under the Bankruptcy Act, and so I might as well just tell you right now that that is the burden.

MR. BUNN: I don't believe I was defrauded in any way. I don't think that happened—

THE COURT: But that's the burden you have to carry.

MR. BUNN: I don't know what happened or why it happened, but I don't think it was fraud.

THE COURT: I realize what you are saying. I realize it, and I appreciate the fact that you don't think so. But that's the burden that you have to carry under the Bankruptcy Act. This is the only section that applies to a situation like this. I might as well tell you because that's really what I have been waiting to hear.

If you want to submit something further by way of a written brief or something, as far as this hearing is concluded today, but a written brief or something as to what you think the law is, fine.

Appendix to Appellant's Brief at 151-72.

fraud and, further, the court itself had not found that the debtor fraudulently procured the order confirming the reorganization plan. The bankruptcy court also found that notice of the confirmation hearing had been delivered to the creditor's counsel and thus it concluded that the creditor had established no legal grounds for setting aside the confirmation order.

The district court adopted the bankruptcy court's findings and conclusions and affirmed the denial of the creditor's motion. The district court also rejected the creditor's argument on appeal that the clerk's failure to send notice of entry of the order confirming the plan entitled the creditor to an extension of time to appeal the March 7 order.

As we review these decisions of the bankruptcy and district courts, we must accept findings of fact unless they are clearly erroneous. We, of course, however, review conclusions of law de novo. *In re Agnew*, 818 F.2d 1284, 1286 (7th Cir. 1987); *In re Kimzey*, 761 F.2d 421, 423 (7th Cir. 1985); Bankr. R. 8013.

II.

We consider first whether the bankruptcy court's order confirming the reorganization plan should be set aside because the creditor did not receive notice of the confirmation hearing. On this issue, the bankruptcy court made the following findings of fact: (1) on December 12, 1984, it issued a notice rescheduling the confirmation hearing for March 7, 1985; (2) copies of this notice were mailed to all parties, including Bunn, as the creditor's counsel; and (3) the notice mailed to Bunn was addressed correctly and was not returned to the clerk's office. Based on these findings, which are not clearly erroneous, the bankruptcy court correctly concluded that notice of the hearing was "reasonably calculated to reach interested parties," *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 318 (1950), and thus satisfied the requirements of due process. We conclude that the court's notice also met the

requirements of the Bankruptcy Code. *See* Bankr. R. 2002(b) ("the clerk . . . shall give . . . all creditors . . . 25 days notice by mail of . . . the hearing to consider confirmation of a plan"); *id.* 9006(e) ("notice by mail is complete on mailing").

Actual receipt of notice of the hearing by the creditor is not required. *See In Re Park Nursing Center, Inc.*, 766 F.2d 261, 263 (6th Cir. 1985). Nevertheless, in this case, in which notice was properly addressed, stamped and mailed, there is a presumption that Bunn received it on behalf of the creditor. *See Hagner v. United States*, 285 U.S. 427, 430 (1932); *In re Nimz Transp., Inc.*, 505 F.2d 177, 179 (7th Cir. 1974); *In re Moseley*, 74 Bankr. 791, 802 (Bankr. C.D. Cal. 1987). Bunn's denial of receipt alone does not rebut the presumption, but merely creates a question of fact. *See In re Farris*, 43 Bankr. 726, 727-28 (Bankr. N.D. Ill. 1984); *In re American Properties, Inc.*, 30 Bankr. 239, 244 (Bankr. D. Kan. 1983). *But see In re Yoder Co.*, 758 F.2d 1114, 1118 (6th Cir. 1985). The bankruptcy court resolved this question against the creditor.

The creditor nevertheless argues that the debtor presented no evidence to meet its burden of showing that notice was in fact mailed. We agree with the district court, however, that the bankruptcy court properly relied on its own records, which showed that notice was properly addressed, sent to the creditor's counsel and not returned to the clerk's office. *Cf. American Properties*, 30 Bankr. at 244 ("Proof of custom of mailing is sufficient . . . . The mailing employee need not testify."). We also do not accept the creditor's argument that the absence of a zip code on the address used by the clerk precludes a finding that the notice was properly addressed. Although the presumption of delivery may be weakened by the absence of a zip code, *cf. id.* ("Where an address is slightly incorrect, . . . the presumption is weakened, but still raised."), it is strengthened in this case by the fact that the notice was never returned to the clerk's office, *see In re Torres*, 15 Bankr. 794, 797 (Bankr. E.D.N.Y. 1981).

Thus, we conclude, as did the courts below, that the creditor has failed to rebut the presumption that notice of the confirmation hearing was delivered to Bunn.[4]

III.

We examine next whether the bankruptcy court properly refused to revoke the confirmation order pursuant to section 1144 of the Bankruptcy Code. It is not clear whether the creditor sought relief in the bankruptcy court pursuant to section 1144. Under the Code, however, section 1144 is the only avenue for revoking confirmation of a plan of reorganization. *See In re Newport Harbor Assocs.*, 589 F.2d 20, 22 (1st Cir. 1978) (the predecessors to section 1144 "consistently have been viewed as providing the exclusive means by which a confirmation may be revoked and the courts, with equal consistency, have demanded strict compliance with their requirements"); *In re Emergency Beacon Corp.*, 48 Bankr. 356, 359 (Bankr. S.D.N.Y. 1985); *In re Braten Apparel Corp.*, 21 Bankr. 239, 255 (Bankr. S.D.N.Y. 1982), *aff'd*, 26 Bankr. 1009 (S.D.N.Y.), *aff'd*, 742 F.2d 1435 (2d Cir. 1983). Section 1144, in effect at the time of the bankruptcy court's decision, provides in part:

> On request of a party in interest at any time before 180 days after the date of the entry of the order of

[4] The creditor argues that the debtor should bear the responsibility for the creditor's absence from the confirmation hearing. Opperman, the debtor's counsel, allegedly misled Bunn, the creditor's counsel, about the nature of the March 7 hearing when Opperman did not respond to Bunn's letter requesting that the "case" be removed from the court calendar. We agree with the district court that the creditor has failed to produce evidence of the debtor's intent to deceive the creditor. In fact, at the August 30 hearing Bunn clearly disavowed any allegation that Opperman misled him, *see supra* note 3, at 5, and, in the memorandum in support of its motion to set aside, the creditor stated that "by some mistake" it failed to receive notice of the hearing. Appendix to Appellant's Brief at 79.

> confirmation, and after notice and a hearing, the court may revoke such order if such order was procured by fraud.

11 U.S.C. § 1144 (amended 1984).[5]

Thus, section 1144 expressly allowed the bankruptcy court to revoke its March 7 order confirming the reorganization plan, if the creditor had met the prerequisite of showing that the court was defrauded. The bankruptcy court found that the creditor had not alleged fraud and the court itself found no evidence that the debtor fraudulently procured the order confirming the plan. The district court, apparently considering only the motion to set aside and the August 30 hearing, agreed that the creditor had failed to allege fraud and thus affirmed the bankruptcy court's decision not to revoke the confirmation order under section 1144.

The creditor contends that the courts before us relied erroneously on the creditor's numerous assertions that it didn't believe there was any fraud. *See supra* note 3. The creditor explains that it misunderstood the district court's repeated requests to prove fraud:

> In an effort to make it clear that no allegations of fraud were being made upon the conduct of the Court or the Clerk of the court, [the creditor] made the statement that there had been no fraud, referring to the failure [of the Clerk] to send [the creditor] notice.

Appellant's Appendix at 35. Thus the creditor claims that its concessions that there had been no fraud merely applied to its loss of procedural opportunities but not to the

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[5] Section 1144 was amended by P.L. 98-353. The first sentence currently reads:

> On request of a party in interest at any time before 180 days after the date of the entry of the order of confirmation, and after notice and a hearing, the court may revoke such order *if and only* if such order was procured by fraud.

11 U.S.C. § 1144 (as amended) (emphasis added).

earlier disclosure statements and submissions made by the debtor to the bankruptcy court. The record does not show that Bunn made this distinction crystal clear to the bankruptcy court.

But, in any event, as to "fraud" in the debtor's earlier submissions to the court, it may be that the bankruptcy and district courts reviewed the creditor's allegations in their entirety to determine whether the debtor had perpetrated a fraud in supplying information to the court. However, we shall, at least for the sake of argument, accept the creditor's position that it "had always considered [the debtor] to be engaging in a fraud upon the court." *Id.* at 34. Thus we examine anew (with respect to the debtor's submissions to the bankruptcy court) the motion to set aside, the transcript of the August 30 hearing and the creditor's memorandum in support of the motion. We conclude that the creditor failed to demonstrate fraud sufficiently to require the bankruptcy court to revoke its March 7 confirmation order.

Although section 1144 requires a showing of fraud, it does not define "fraud." *Braten Apparel*, 21 Bankr. at 256 ("Congress provided no dictionary for the word 'fraud' and left it to the development of judicial gloss to guide delineation of types of conduct generally understood to constitute fraud."). It is fair to say, however, that the courts require a showing of actual fraudulent intent. *See id.*; 5 *Collier on Bankruptcy* ¶ 1144.01, at 1144-2 (15th ed. 1987); 9 *Collier on Bankruptcy* ¶ 11.02[3] (14th ed. 1978).

The creditor's motion to set aside and its memorandum in support of that motion fail to cite clear, specific and demonstrable instances involving actual fraudulent intent. In the memorandum, the creditor states broadly that the debtor filed false or fraudulent financial statements and invites the bankruptcy court to examine its objections to the amended disclosure statement and its objections to the reorganization plan to determine for itself "whether the debtor has engaged in fraud." Appendix to Appellant's

Brief at 80. In those objections, the creditor complains that the debtor incorrectly stated facts, and it seeks explanations for changes or inconsistencies in numbers. The creditor alleges that "gross and serious inconsistencies" between the disclosure statement and the debtor's financial records raise "insurmountable questions concerning the accuracy of the disclosure statements and the plans submitted to the court." *Id.* at 88. Similarly at the August 30 hearing, Bunn testified that the debtor's assets did not accurately reflect $265,000 received by it in accounts receivable. *See supra* note 3, at 5.

Thus, the creditor alleges that the debtor's disclosure statements are grossly inaccurate and inconsistent and that they require explanation. The creditor does not, however, offer any evidence of the debtor's intent to defraud the court.[6] Without a specific showing of the requisite fraudulent intent, the bankruptcy court had no authority under section 1144 to revoke its confirmation order. *See In re D.F.D. Inc.*, 43 Bankr. 393, 395 (Bankr. E.D. Pa. 1984) (where creditor proffered no testimony or other evidence at the hearing to support its allegations, it "failed to carry its burden of proving that the debtor procured the order of confirmation through fraud"); *Torres*, 15 Bankr. at 798; *see also In re Graco, Inc.*, 267 F. Supp.

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[6] In *In re Moseley*, 74 Bankr. 791, 803 (Bankr. C.D. Calif. 1987), a case involving a Chapter 13 reorganization plan, the bankruptcy court explained the burden a creditor must carry to have the plan revoked under 11 U.S.C. § 1330 (which is idential to section 1144):

> To support a complaint for revocation, the plaintiff must prove each of the elements of a traditional cause of action for deceit: (1) that the debtor made a representation regarding her compliance with Code § 1325 which was materially false; (2) that the representation was either known by the debtor to be false, or was made without belief in its truth, or was made with reckless disregard for the truth; (3) that the representation was made to induce the court to rely upon it; (4) the court did rely upon it; and (5) that as a consequence of such reliance, the court entered the confirmation order.

952, 954 (D. Conn. 1967) ("Fraud is not to be inferred."); 14 *Collier on Bankruptcy* ¶ 11-41.03, at 11-41-5 (14th ed. 1978) ("the circumstances constituting the alleged fraud are to be stated with particularity").[7]

We conclude that where, as in the present case, the creditor fails to show specific acts involving fraudulent intent, it is not entitled to have a confirmed plan of reorganization revoked under section 1144.[8]

The creditor nonetheless appears to argue that the bankruptcy court should have exercised its equitable powers to provide relief to the creditor in this case. We agree that the bankruptcy court as a court of equity could have fashioned relief for the creditor. *See In re Lintz West Side Lumber, Inc.*, 655 F.2d 786, 789 (7th Cir. 1981) ("It is now well settled that a bankruptcy judge has the power to reexamine and revise an order which he entered during the pendency of bankruptcy proceedings.").[9] We do

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[7] Even the creditor seems to acknowledge the insufficiency of its allegations of fraud. On appeal, the creditor characterizes its allegations of purported fraud as "not very strong" and "weak." Appellant's Brief at 37.

[8] The creditor apparently argues, in the alternative, that the reorganization plan should be modified. Only the proponent, however, of a Chapter 11 reorganization plan can seek to have it modified. 11 U.S.C. § 1127(b); *see also In re A.J. Mackay Co.*, 50 Bankr. 756, 761 (Bankr. D. Utah 1985).

[9] Congress codified the traditional equity powers of the bankruptcy court in section 105 of the Code:

> The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of power.

11 U.S.C. § 105(a); *see In re Chinichian*, 784 F.2d 1440, 1442-43 (9th Cir. 1986) (confirmation of a plan may be revoked pursuant to section 105). *But cf. In re Chung King, Inc.*, 753 F.2d 547,

(Footnote continued on following page)

not believe, however, the bankruptcy court abused its discretion in not providing equitable relief to this creditor. As we have noted, "Although a reorganization court is indeed a court of equity, . . . it is yet constrained by the dictates of the Bankrupty Act." *In re Chicago, M., St. P. & Pac. R.R.*, 830 F.2d 758, 766 (7th Cir. 1987); *see also Norwest Bank Worthington v. Ahlers*, 108 S. Ct. 963, 968-69 (1988) ("whatever equitable powers remain on the bankruptcy courts must and can only be exercised within the confines of the Bankruptcy Code"). Thus, where the bankruptcy court chose to confine itself to section 1144 to provide relief to the creditor, and where it made this choice very clear by repeatedly instructing the creditor to demonstrate fraud, we will not reverse the court for not providing equitable relief.

IV.

One of the most troubling aspects to this case is that the creditor appears to have lost its right to appeal directly the court's order confirming the reorganization plan. Under Bankruptcy Rule 8002, a party wishing to appeal a confirmation order must file a notice of appeal within ten days of the date of the order. If requested within the original ten-day period, a twenty-day extension may be granted.[10] Thus, if granted an extension, a party has a

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[9] *continued*
549-50 (7th Cir. 1985) (because the policy of finality in confirmed judicial sales should be protected unless "compelling equities" outweigh it, a "bankruptcy court may vacate a prior order confirming a sale . . . only in very limited circumstances in the exercise of its powers as a court of equity").

[10] The extension of time for appeal is governed by Bankr. R. 8002(c), which provides:

> The bankruptcy court may extend the time for filing the notice of appeal by any party for a period not to exceed 20 days from the expiration of the time otherwise prescribed by this rule. A request to extend the time for filing a notice of appeal must be made before the time for filing a notice of ap-

(Footnote continued on following page)

maximum time period of thirty days to appeal an order confirming a plan. In the present case, however, the creditor did not learn of the March 7 confirmation order until May 15, more than two months later.

The creditor argues that because the clerk's failure to mail notice of the entry, as required by the Bankruptcy Rules, prevented it from appealing the confirmation order directly within the specified period, an extension of time, beyond that allowed by Rule 8002(c), should be granted. The district court rejected the creditor's argument, stating that any extension not allowed by Rule 8002(c) was strictly proscribed.

Although Bankruptcy Rule 9022(a) requires the clerk to mail notice of any judgment or order of the court, it further provides that lack of notice of the entry of such orders does not provide a basis for extending the time to appeal.[11] The district court considered this rule controlling, and we agree.

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[10] *continued*

peal has expired, except that a request made not more than 20 days after the expiration of the time for filing a notice of appeal may be granted upon a showing of excusable neglect if the judgment or order appealed from does not authorize the sale of any property or the obtaining of credit or the incurring of debt under § 364 of the Code, or is not a judgment or order approving a disclosure statement, confirming a plan, dismissing a case, or converting the case to a case under another chapter of the Code.

[11] Entry of an order and provision of notice is governed by Bankr. R. 9022(a), which states:

> Immediately on the entry of a judgment or order the clerk shall serve a notice of the entry by mail in the manner provided by Rule 7005 on the contesting parties and on other entities as the court directs. Service of the notice shall be noted in the docket. Lack of notice of the entry does not affect the time to appeal or relieve or authorize the court to relieve a party for failure to appeal within the time allowed except as permitted in Rule 8002.

The Advisory Committee Note describes Rule 9022(a) as an "adaptation" of Fed. R. Civ. P. 77(d), which also requires the clerk to mail to the parties notice of an order or a judgment and which also provides that the clerk's failure to notify does not authorize courts to extend the time to appeal.[12] And the Advisory Committee Note to Rule 77(d) explicitly cautions parties against relying on the clerk to provide them with notice of judgments.[13]

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[12] *Compare* Fed. R. Civ. P. 77(d):

> Immediately upon the entry of an order or judgment the clerk shall serve a notice of the entry by mail in the manner provided for in Rule 5 upon each party who is not in default for failure to appear, and shall make a note in the docket of the mailing. Such mailing is sufficient notice for all purposes for which notice of the entry of an order is required by these rules; but any party may in addition serve a notice of such entry in the manner provided in Rule 5 for the service of papers. Lack of notice of the entry by the clerk does not affect the time to appeal or relieve or authorize the court to relieve a party for failure to appeal within the time allowed, except as permitted in Rule 4(a) of the Federal Rules of Appellate Procedure.

with Bankr. R. 9022(a) (*supra* note 11).

[13] The Advisory Committee explained:

> Rule 77(d) as amended makes it clear that notification by the clerk of the entry of a judgment has nothing to do with the starting of the time for appeal; that time starts to run from the date of entry of judgment and not from the date of notice of the entry. Notification by the clerk is merely for the convenience of litigants. And lack of such notification in itself has no effect upon the time for appeal; but in considering an application for extension of time for appeal as provided in [Fed. R. App. P. 4(a), of which Bankr. R. 8002 is an adaptation], the court may take into account, as one of the factors affecting its decision, whether the clerk failed to give notice as provided in Rule 77(d), or the party failed to receive the clerk's notice. It need not, however, extend the time for appeal merely because the clerk's notice was not sent or received. It would, therefore, be entirely unsafe for a party to rely on absence of notice from the clerk of the entry of a judgment, or to rely on the adverse party's failure to serve notice of the

(Footnote continued on following page)

Thus, many courts have held that the district courts lack authority to relieve parties who fail to take timely appeals because they never received notice of the entry of judgments. *See, e.g., Polyok Corp. v. Manning*, 793 F.2d 1318, 1320 (D.C. Cir. 1986) (Rule 77(d) is "unconditional"); *Wilson v. Atwood Group*, 725 F.2d 255, 257 (5th Cir.) (en banc) (Rule 77(d) is "strict, but its meaning is plain. We have consistently held that the simple failure of the clerk to mail notice of the entry of the judgment, without more, does not permit relief to a party who has failed to appeal within the prescribed time."), *cert. dismissed*, 468 U.S. 1222 (1984); *Mennen Co. v. Gillette Co.*, 719 F.2d 568, 570 (2d Cir. 1983) ("mere failure of the clerk to give the parties notification . . . does not . . . warrant an extension of time to appeal"); *see also* C. Wright & A. Miller, 12 *Federal Practice and Procedure* § 3084, at 182 (1973). *But see Expeditions Unltd. Aquatic Enters., Inc. v. Smithsonian Inst.*, 500 F.2d 808, 810 (D.C. Cir. 1974) (court has discretion to vacate and reenter judgment to allow timely appeal when parties had no notice of entry of judgment, winning party not prejudiced by appeal and losing party acted within reasonable time after learning of entry).

In *Spika v. Village of Lombard*, 763 F.2d 282, 286 (7th Cir. 1985), *cert. denied*, 474 U.S. 1056 (1986), we expressly agreed with the general principle that Fed. R. Civ. P. 60(b)[14] cannot be invoked to provide relief from Rule 77(d) when "the *sole* reason asserted for that relief is the failure of a litigant to receive notice of entry of a judgment."

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[13] *continued*

entry of a judgment. Any party may, of course, serve timely notice of the entry of a judgment upon the adverse party and thus preclude a successful application, under [Fed. R. App. P. 4(a)], for the extension of the time for appeal.

[14] Rule 60(b) authorizes a court to relieve a party from a final judgment or order for a variety of reasons, including mistake, excusable neglect, newly discovered evidence, fraud, or "any other reason justifying relief from the operation of the judgment."

Bankruptcy Rule 9022(a) must be followed as strictly as Rule 77(d). Thus, in this case, we hold that the creditor's failure to receive notice of the entry of the order confirming the reorganization plan is not alone sufficient grounds for extending the time to appeal that order beyond the constraints of Rule 8002(c). The Advisory Committee Note to Rule 8002(c) explains the importance of limiting the time to appeal certain bankruptcy court orders:

> To expedite the disposition of appeals the maximum extension of time is 20 days . . . . Orders of the bankruptcy court relating to the sale of property, extension of credit, confirmation of a plan, dismissal or conversion of the case, and approval of the disclosure statement are of such significance to the administration of the case, the parties in interest, and third parties that this subdivision requires that either an appeal or a motion for extension be filed within the original 10 day period.

See also 9 *Collier on Bankruptcy* ¶ 8002.03[2], at 8002-6 (15th ed. 1987) ("Cases interpreting Rule 8002 . . . have uniformly held that the *sine qua non* of a bankruptcy appeal is a timely filed notice of appeal.").

The creditor nevertheless directs us to Bankruptcy Rule 3020(c), which states that "the order of confirmation . . . and notice of entry thereof shall be mailed promptly by the clerk to the debtor, creditors, . . . and other parties in interest." The creditor contends that this rule, because it specifically provides for notice of orders confirming reorganization plans, should govern this case rather than Rule 9022(a), which is a general provision requiring notice of all bankruptcy orders and adjustments. The creditor then explains that Rule 3020(c), unlike Rule 9022(a), is silent with respect to whether the time to appeal is affected by the clerk's failure to provide notice. Thus, the creditor concludes, it may be granted an extension of time to appeal directly the confirmation order.

We disagree. In our view, Rule 9022(a), while of general application, does govern confirmation orders. If Rule 9022(a)

were in actual conflict with Rule 3020(c), we could be persuaded to follow Rule 3020(c) rather than Rule 9022(a) because, arguably, the more specific bankruptcy rule would govern. *Cf. In re Johnson*, 787 F.2d 1179, 1181 (7th Cir. 1986) ("a specific statute takes precedence over a more general statute"). But Rule 9022(a)'s requirement—that lack of notice does not affect the time to appeal—does not contradict in any way Rule 3020(c), which is silent on the right to appeal. Moreover, Rule 9022(a) provides that a court may extend the time to appeal only as permitted by Rule 8002. Rule 8002(c) by its terms includes confirmation orders. *See supra* note 10. Thus, we conclude that Rule 3020(c) does not provide a court with discretion to extend the time to appeal from a confirmation order.

Finally, we do not accept the creditor's contention that Rule 9022(a) violates principles of due process. The fifth amendment requires that a party must be provided with notice of the pendency of an action and an opportunity to be heard before being deprived of a protected property interest. *Mullane*, 339 U.S. at 313-14. Thus, in *New York v. New York, N.H. & H. R.R.*, 344 U.S. 293, 297 (1953), a case involving a railroad reorganization, the Supreme Court held that creditors "have a right to assume that the statutory 'reasonable notice' [of the period in which claims may be filed] will be given them before their claims are forever barred." *See Reliable Elec. Co., Inc. v. Olson Constr. Co.*, 726 F.2d 620, 623 (10th Cir. 1984) ("the discharge of a claim without reasonable notice of the confirmation hearing is violative of the fifth amendment").

In the present case, we have accepted the bankruptcy court's finding that the creditor received actual notice of the confirmation hearing. *See supra* pp. 6-8. This notice of the pendency of a hearing to consider confirmation of the plan is sufficient to satisfy due process requirements because the creditor had the opportunity to be heard at that March 7 hearing. Although the creditor claims to have not received notice of the hearing, it failed to convince the bankruptcy court. The apparent harshness of

the result here is ameliorated somewhat by the creditor's opportunity to challenge the confirmed plan pursuant to section 1144.

The order of the district court is

AFFIRMED.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

Landahl, Brown & Weed Associates, Inc.	)	
Appellant	)	IP 86-117-C
Longardner & Associates, Inc.	)	
Appellee	)	
In re:	)	
Longardner & Associates Inc.	)	IP 82-4202 RA (s)
Debtor	)	

ORDER OF MARCH 19th, 1987

This matter is before the Court on Landahl, Brown & Weed Associates, Inc.'s (hereinafter "Landahl") appeal from orders entered by the Bankruptcy Court on March 7, 1985 and December 9, 1985. The March 7, 1985 order confirmed the Debitor's Amended Plan of Reorganization under Chapter 11 of the Bankruptcy Code. The December 9, 1985 order denied Landahl's motion to reconsider and motion to set

aside the March 7, 1985 order. A single notice of appeal was filed on December 13, 1985.

Jurisdiction of the Court is properly invoked pursuant to 28 U.S.C. §§ 158 and 1334(a) and Rule 8001, et seq., Bankruptcy Rules. This Court's review of the Bankruptcy Court's decisions is governed by Rule 8013, Rules of Bankruptcy Procedure, which provides that the district court

> "may affirm, modify or reverse a bankruptcy court's judgment, order or decree or remand with instructions for further proceedings. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the bankruptcy courts to judge the credibility of witnessess.

The "clearly erroneous" standard of review applies to this Court's consideration of the Bankruptcy Court's factual determination, but it does not apply to appellate review of questions of law or mixed questions of fact and law. In Re Rushville Credit Ass'n v. Mohr, 42 B.R. 1000, 1002 (S.D. Ind. 1984).

Having carefully reviewed the Bankruptcy Court's orders, the briefs of the parties, the authorities cited and the entire record on appeal, the Court concludes that the orders of the Bankruptcy Court must be affirmed.

On October 22, 1982, the appellee-debtor, Longardner & Associates, Inc. (hereinafter "Longardner"), filed its petition for relief under Chapter 11 of the Bankruptcy Code. Its amended plan of reorganization was filed on September 19, 1984, and its second amended disclosure statement on October 30, 1984.

On November 1, 1984, the Bankruptcy Court entered its order approving the disclosure statement and setting a hearing on confirmation of the plan for November 26, 1984. The order further provided that any objection to the plan must be filed by November 23, 1984. Landahl filed an objection on November 21, 1984.

After a brief hearing held on November 26, 1984, the Bankruptcy Court determined that a reassigned hearing on confirmation should be scheduled. On December 12, 1984, the Court issued its

notice setting a hearing on confirmation of the plan for March 7, 1985. On the same date, the Court entered its certificate of mailing, signed by the deputy clerk, verifying that copies of the notice were sent by first class mail to all creditors and parties in interest, including Landahl, whose notice was sent to the address of its attorney, Edward DeV. Bunn.

The confirmation hearing was held on March 7, 1985. No one appeared on behalf of Landahl or presented evidence in support of Landahl's objection to confirmation of the plan. At the hearing the Court heard testimony from Ted E. Andrews, C.P.A., regarding the plan and arguments of counsel.

The Bankruptcy Court entered an order confirming Longardner's amended plan of reorganization on March 7, 1985. Whether the order confirming the plan was mailed to creditors is unclear. The Bankruptcy Court's docket makes no reference to distribution.

On May 21, 1985, Landahl filed its motion to set aside the March 7, 1985 order confirming the plan and motion to reconsider. The Bankruptcy Court held

an evidentiary hearing to consider the motions on August 30, 1985. At the hearing Landahl offered no exhibits into evidence and offered no testimony other than that of its counsel, Mr. Bunn. In his courtroom statements and in his testimony, Mr. Bunn bases his request to set aside confirmation of the plan solely on the basis of lack of notice. When Mr. Bunn was instructed by the Bankruptcy Court that the only basis for setting aside the order of confirmation was if the order had been procured by fraud, the following exchange occurred:

> THE COURT: Yes, but you have to prove a further factor, fraud. You haven't gotten to that point yet.
>
> MR. BUNN: I don't believe there was any fraud. I am not even suggesting there was fraud.
>
> THE COURT: But that's the only section you can set it aside under the Bankruptcy Act, and so I might as well just tell you right now that that is the burden.
>
> MR. BUNN: I don't believe I was defrauded in any way. I didn't think what happened--

THE COURT: But that's the burden you have to carry.

MR. BUNN: I don't know what happened or why it happened, but I don't think it was fraud.

THE COURT: I realize what you are saying. I realize it, and I appreciate the fact that you don't think so. But that's the burden that you have to carry under the Bankruptcy Act. That is the only section that applies to a situation like this. I might as well tell you that because that's really what I have been waiting to hear.

On December 9, 1985, the Bankruptcy Court entered its findings of fact, conclusions of law and entry denying Landahl's motion to set aside and motion to reconsider. The Bankruptcy Court found that under the Bankruptcy Code, Landahl's only means of obtaining relief from the confirmed plan was pursuant to Code Section 1144 which provides that the Court may revoke a confirmation order if such order was procured by fraud. The Court concluded that Landahl had not alleged, nor had it shown, that the order confirming the amended plan was procured by fraud. Accordingly the

Court held that the confirmation order may not be revoked under Code Section 1144. Secondly, the Bankruptcy Court found that notice of the confirmation hearing had been delivered to Landahl's counsel and concluded that Landahl established no legal grounds upon which the Court could set aside this order of March 7, 1985, confirming the debtor's amended plan of reorganization.

Landahl appeals the December 9, 1985 order contending that the Bankruptcy Court erred in refusing to set aside the order confirming the plan on the ground that Landahl did not receive notice of the hearing on confirmation. Landahl argues that notice was in fact mailed and mailed to the correct address. Because Longardner presented no evidence of mailing the notice, Landahl urges that it should have prevailed on the notice issue as a matter of law. The Court disagrees.

The Bankruptcy Court properly relied on its own records to find that the Court had issued notice of the hearing on December 12, 1984, that notice was properly addressed and sent first class mail to Landahl in care of its attorney, Mr. Bunn, that the notice sent to

Mr. Bunn was not returned to the Clerk's Office,and that based on these circumstances, notice was delivered to the office of Landahl's attorney. Based on these findings, the Bankruptcy Court properly concluded that Mr. Bunn's denial of receipt did not rebut the presumption that notice was delivered to his address. The Court concludes, as did the Bankruptcy Court, that the fact that the notice was properly addressed and mailed to Landahl's attorney raised the rebuttable presumption that the notice was received by Mr. Bunn. In re Gabel, 61 B.R. 661, 664 (Bkrtcy. W.D. La., 1985) In re American Properties, Inc., 30 B.R. 247, 250 (Bkrtcy. ka., 1983) In re Majors, 19 B.R. 275, 278 (Bkrtcy. M.D. Tenn., 1982); In re Torres, 15 B.R. 794, 797 (Bkrtcy. E.D. N.Y., 1981). Denial of receipt by Mr. Bunn did not as a matter of law rebut that presumption, In re Farris, 43 B.R. 726, 728 (Bkrtcy. N.D. Ill., 1984); In re Cresta, 40 B.R. 953, 955 (Bkrtcy. N.D. Ohio, 1983); In re Mackey, 33 B.R. 332, 334 (Bkrtcy, ka., 1983) In re Majors, 19 B.R. 278, it merely raised a question of fact which the Bankruptcy Court resolved against Landahl. See In re American Properties, Inc., 30 B.R. 247, 250

(Bkrtcy. ka., 1983). Under the facts of this case, such a resolution is not clearly erroneous. Finally Landahl's contention that the address used by the Clerk lacked a zip code does not foreclose the Bankruptcy Court's conclusion that the notice sent was properly addressed. A minor discrepancy in the address may serve to weaken the presumption, but does not refute it. In re American Properties, Inc., 30 B.R. 250; In re American Properties, Inc., 30 B.R. 239, 244 (Bkrtcy. ka., 1983); See also In re Gabel, 61 B.R. 661, 664 (Bkrtcy. W.D. La., 1985). Moreover, the presumption in this case was reinforced by the fact that notice mailed to Mr. Bunn was never returned to the Clerk's Office. See In re Torres, 15 B.R. 797.

Landahl secondly moved the Bankruptcy Court to set aside confirmation of the plan contending that Longardner's counsel deliberately mislead Landahl's counsel, Mr. Bunn. Landahl argued that Longardner's counsel knew Landahl was under the impression that the case had been removed from the calendar for March 7, 1985 and deliberately failed to advise the Court or Landahl of the misunderstanding.

On appeal Landahl argues that he should have prevailed on this issue as a matter of law because Longardner failed to prove lack of intent to deceive. Again, the Court disagrees.

The Bankruptcy Court found that there was not presuasive evidence that Longardner's representatives ever mislead Landahl or its attorneys and concluded that the plan should not be set aside for fraud. The finding is not clearly erroneous in light of Mr. Bunn's testimony at the hearing on Landahl's motion to set aside. At the hearing Mr. Bunn disavowed any fraud. He testified:

> I don't suggest that Mr. Opperman intended to mislead me intentionally in regard to the case being taken off the docket. I just know that what my understanding was and what I said -- and he may very well have assumed that when I used the word case that I was talking about that particular motion at issue being taken off. (Tr. 39 August 30, 1985.)

Further, in its memorandum in support of the motion to set aside the order, Landahl again denies any allegation of fraud relating to notice. The memorandum reads: "Landahl does not suggest that the March 7, 1985 order was produced by fraud, but by some mistake notice was not sent to Landahl of the hearing." Since Landahl

never produced evidence of fraud, the burden of proof never shifted to Longardner to prove lack of intent to deceive. Consequently, the Court concludes that the Bankruptcy Court properly refused to set aside the confirmation order.

Landahl next argues that the March 7, 1985 order should be set aside and/or the time for appeal extended because Landahl was never given notice of entry of that order. Having reviewed the record, the Court concludes the order should not be set aside. Absent a finding of fraud or compelling circumstances, the failure to notify an individual creditor should rarely constitute grounds to set aside a confirmed plan. Solon Automated Services v. Georgetown, 22 B.R. 312, 317 (Bkrtcy, S.D. Ohio, 1982). Here the Bankruptcy Court properly found there was no evidence of fraud and this Court finds there are no compelling circumstances which would justify setting aside confirmation of the plan.

Moreover, the Court concludes that the facts of this case present no grounds upon which the Court could extend Landahl's time to appeal the March 7, 1985

order. The Court finds that Longardner had no obligation to serve Landahl with a copy of the Bankruptcy Court's order confirming the plan, particularly in the absence of any evidence that Longardner concealed entry of the order from Landahl. Further, it is well settled that attorneys have a duty to monitor the dockets to keep themselves informed as to the entry of orders they wish to appeal. Matter of Futuronics, Inc., 53 B.R. 126, 127 (Bkrtcy. S.D. N.Y., 1985); In re Torres, 15 B.R. at 797. In this case Landahl did not exercise due diligence to ascertain whether the order had been entered, nor has it given sufficient reason for lack of such diligence. Landahl had made no effort to obtain local counsel in this matter and by its own admission made no inquiry to the Court concerning the status of the plan.

Finally the Clerk's failure to serve the confirmation order on Landahl has no effect on Landahl's time to appeal the order. See generally In re Hilliard, 36 B.R. 80, 82 (S.D. N.Y. 1984). Bankruptcy Rule 9022(a) requires the Clerk of the Court to mail notice of any order entered by the Bankruptcy Judge.

Notwithstanding that directive, the Rule further provides:

> Lack of notice of the entry does not affect the time to appeal or relieve or authorize the court to relieve a party for failure to appeal within the time allowed, except as permitted in Rule 8002.

Under Rule 8002 notice of appeal must be filed within ten (10) days of the date of the entry of the order appealed from. The time limit established for filing the notice of appeal is mandatory and jurisdictional. In re Curry and Sorenson, 59 B.R. 824, 826 (Bkrtcy. App. 9 Cal., 1986); In re Saunders, 13 B.R. 634, 635 (Bkrtcy. P. Rico, 1981) decided under the former Bankruptcy Rules. An extension of time is authorized under Subdivision (c) so long as the request is made before the original 10-day period has expired. The Advisory Committee Note suggests the reason why the time limit is so strictly enforced. The Note explains that "orders of the Bankruptcy Court relating to . . . confirmation of a plan. . . . are of such significance to the administration of the case. . .that his subdivision requests that either an appeal or motion for extension be filed within the original 10 day period." The Note further advises, "if a

timely appeal is not filed, no appeal may be taken later." In this case, Landahl did not file a timely notice of appeal from the March 7, 1985 order, did not timely seek an extension, and did not otherwise demonstrate any compelling circumstances to justify an extension of the time for filing a notice of appeal. Consequently, Landahl has lost its right to directly appeal the March 7, 1985 order confirming the plan.

The remaining issue is whether the Bankruptcy Court erred in refusing to set aside this order confirming the plan on grounds of fraud. The Bankruptcy Court found that "Landahl does not allege, nor has it shown, that the Debtor or its representatives procured the confirmation of the Amended Plan by fraud," and thus concluded that the order confirming the plan could not be revoked under the Code. The finding is not clearly erroneous and the conclusion is supported by the evidence and the law.

Under the Bankruptcy Code, Landahl's only means of obtaining relief from the confirmed plan was pursuant to 11 U.S.C. § 1144, which provides:

> On request of a party in interest at any time before 180 days after the date of entry of the

> order of confirmation, and after notice and a hearing, the court may revoke such order if such order was procured by fraud.

Fraud is the only basis upon which the confirmed plan could be revoked. See In re A. J. Mackey Co., 50 B.R. 756 (D.C. 1985); In re Emergency Beacon Corp., 48 B.R. 356 (D.C. 1985). The time period established by Section 1144 may not be circumvented by the invocation of Federal Rule of Civil Procedure 60(b). See Rule 9024 and Advisory Committee Note.

In this case, Landahl did not allege fraud in its motion to set aside and motion to reconsider, nor did it allege fraud at the evidentiary hearing held on August 30, 1985. Moreover, the record from the hearing is devoid of any documentary evidence, independent witness testimony or argument on the issue of fraud. Landahl was informed by the Bankruptcy Court at the hearing that it had the burden to prove fraud and that it had not met that burden. Yet, Landahl never sought a continuance of the hearing or made any effort to reopen the record and offer any evidence of the alleged fraud. Simply put, the issue of fraud was not presented to the Bankruptcy Court within 180 days of the entry of the

March 7, 1985 order. Accordingly, the Bankruptcy Court properly concluded that Landahl had not shown fraud and that there was no basis to set aside the plan under Section 1144.

Based on the foregoing the Court finds that Landahl did not timely appeal March 7, 1985 order and hereby affirms the Bankruptcy Court's order of December 9, 1985.

Dated this 19th day of March, 1987.

United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

IN RE:	)	
	)	
Longardner & Associates, Inc.	)	In Bankruptcy No.
	)	
	)	
Debtor	)	IP 82-4202 RA

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ENTRY ON MOTION TO SET ASIDE ORDER CONFIRMING AMENDED PLAN AND MOTION TO RECONSIDER

This matter came on before the Court on August 30, 1985, for hearing upon the Motion to Set Aside Order Confirming Amended Plan and Motion to Reconsider filed on May 21, 1985, by Landahl, Brown & Weed Associates, Inc. ("Landahl"). A Response to this Motion was filed on May 30, 1985, by Longardner & Associates, Inc., the Debtor herein. Notice of the August 30, 1985, hearing date was imparted to the parties by means of the Official Court Notice issued by the Court on June 13, 1985.

At the hearing, the Debtor appeared by counsel, Leonard Opperman. Landahl appeared by counsel, Edward DeV. Bunn. Robert Longardner

appeared in person and by counsel, Jerry Williams. At the hearing's conclusion, the Court requested the parties to submit briefs on the issues raised at the hearing. The parties have now complied with this request.

And the Court, having reviewed the evidence, having considered the arguments of counsel for the parties, and being duly advised in the premises, now makes the following findings of fact:

FINDINGS OF FACT

1. The Debtor filed its voluntary petition for relief under Chapter 11 of Bankruptcy Code on October 22, 1982.

2. The Debtor filed its Amended Plan of Reorganization and Amended Disclosure Statement on September 19, 1984. On September 21, 1984, this Court issued its notice that this Plan and Disclosure Statement had been filed and that a hearing on the Amended Disclosure Statement would be held on October 12, 1984. This notice was sent to all parties in interest, including Landahl, whose notice was sent to the address of its attorney, Edward DeV. Bunn.

3. On October 9, 1984, Landahl filed its Objection to Amended Disclosure Statement. The Debtor, in response, filed its Second Amended Disclosure Statement on October 30, 1984. On November 1, 1984, the Court entered its order approving the Disclosure Statement and setting a hearing on confirmation of the Plan for November 26, 1984. This Order provided that any objection of confirmation of the Plan must be filed by November 23, 1984. A copy of this order, along with copies of the Plan and Disclosure Statement, was sent to all creditors, including Landahl through its attorney, Mr. Bunn.

4. Landahl filed an objection to confirmation of the Debtor's Amended Plan of Reorganization on November 21, 1984. After holding a hearing on November 26, 1984, at which Landahl appeared by counsel, the Court determined that a reassigned confirmation hearing should be held. Accordingly, on December 12, 1984, the Court issued its notice setting a reassigned confirmation hearing for March 7, 1985.

5. On December 12, 1984, the Court entered its certificate of mailing, signed by the Deputy Clerk,

verifying that copies of this notice were sent by first class mail to all creditors and parties in interest, including Landahl, whose notice was sent to the address of its attorney, Edward DeV. Bunn.

6. Bunn testified that he never received this notice. Bunn did, however, verify that the address to which this notice was mailed was his correct mailing address. The Court's records show that the notice mailed to Bunn was not returned to the Clerk's office, as it should have been if it could not be delivered as addressed.

7. In light of all the evidence, the Court finds that the notice of the reassigned confirmation hearing on March 7, 1985, was delivered to the office of Landahl's attorney.

8. The scheduled confirmation hearing was held on March 7, 1985. No one appeared on behalf of Landahl or presented evidence in support of Landahl's objection to confirmation of the Amended Plan of Reorganization. The Court accordingly entered its order confirming the Amended Plan on March 7, 1985.

9. Landahl does not allege, nor has it shown, that the Debtor or its representatives procured the confirmation of the Amended Plan of Reorganization by fraud. Landahl has submitted no persuasive evidence that the Debtor's representatives ever misled Landahl or Bunn, its attorney.

Whereupon, the Court now enters its conclusions of law:

CONCLUSIONS OF LAW

1. The Court has jurisdiction over the parties to this proceeding. The Court also has jurisdiction over this case and its subject matter under 28 U.S.C. Sec. 1334, 28 U.S.C. Sec. 157, and the general order of referral issued by the United States District Court for the Southern District of Indiana on July 11, 1984. This is a core proceeding within the meaning of 28 U.S.C. Sec. 157(b)(2).

2. By its petition, Landahl asks the Court to set aside its order confirming the Amended Plan.

3. Generally, under Code Sec. 1141, a confirmed plan of reorganization is binding on all creditors, and must be enforced as written. In re

American Properties, Inc., 30 B.R. 239 (Bkrtcy D. Kan. 1983).

4. Under the Code, Landahl's only means of obtaining relief from the Plan as confirmed is provided by Code Sec. 1144, which states:

> On request of a party in interest at any time before 180 days after the date of the entry of the order of confirmation, and after notice and a hearing, the court may revoke such order if such order was procured by fraud.

Landahl has not alleged, and the Court has not found, that the Debtor procured the order confirming the Amended Plan of Reorganization by fraud. The Court accordingly concludes that the order confirming the Amended Plan herein may not be revoked under Code Sec. 1144.

5. Landahl contends that, notwithstanding the requirements of Code Sec. 1144, the Court must set aside its confirmation order because Landahl received no notice of the March 7, 1985, hearing on the confirmation of that Plan.

6. Generally, a plan of reorganization may not be made binding upon a creditor without due process of law, including notice and an opportunity to be heard.

Reliable Electric Co., Inc. v. Olson Construction Co., 726 F2d 620 (10th Cir. 1984). The requirements of due process are met only if the method used to give notice to creditor is "reasonable calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." Matter of D.H. Overmyer Co., 40 B.R. 990, 995 (S.D.N.Y. 1984); see Mullane v. Central Hanover Trust Co. 339, U.S. 306 (1950)

7. The court has found that notice of the March 7, 1985 confirmation hearing was sent by first class mail on December 12, 1984 to all creditors and parties in interest, including Landahl, at the address of its attorney. This means of giving notice to all creditors satisfied the requirements of Bankruptcy Rules 9014 and 7004(b). Such notice was "reasonably calculated to reach interested parties," and thus was sufficient to satisfy the requirements of due process. See Matter of Park Nursing Center, Inc., 766 F3d 261 (6th Cir. 1985). Due process did not require the Debtor to use the most reliable method of service available or to guarantee that all creditors had actual knowledge of the March 7, 1985,

confirmation hearing. Id. The Court accordingly concludes that, whether or not Landahl's attorney got actual notice of the confirmation hearing, Landahl has not established that the Court, in confirming the Debtor's Amended Plan, denied Landahl due process of law.

8. Further, even if due process required that actual notice of the confirmation hearing be received by all creditors, Landahl would still not be entitled to relief. When mail is properly addressed, stamped, and deposited in the mail system, there is a presumption that it was received by the party to whom it was sent. In re American Properties, Inc., 30 B.R. 239 (Bkrtcy. D. Kan. 1983). Denial of receipt does not rebut the presumption, but merely raises a question of fact. Id. The Court has found that the notice at issue was properly addressed, stamped, and sent to Landahl's attorney by first class mail. Although Landahl's attorney denied having seen this notice, the Court concludes Landahl has failed to rebut the presumption that the notice was delivered to the attorney's address.

9. The Court accordingly concludes that Landahl has established no legal grounds upon which the Court may set aside its order, dated March 7, 1985, confirming the Debtor's Amended Plan of Reorganization.

ENTRY

Based on the foregoing findings of fact and conclusions of law, it is ORDERED, ADJUDGED, AND DECREED that the Motion to Set Aside Order Confirming Amended Plan and Motion to Reconsider filed by Landahl, Brown & Weed Associates, Inc., on May 21, 1985, should be and is hereby denied.

Dated this the 9th day of December, 1985 at Indianapolis, Indiana.

NICHOLAS W. SUFANA
BANKRUPTCY JUDGE

cc. Leonard Opperman, Attorney for the Debtor, Longardner & Associates, Inc.
Jerry Williams, Attorney for Robert Longardner
Edward DeV. Bunn, Attorney for Landahl, Brown & Weed Associates, Inc.